St. John's Law Review

Volume 56, Winter 1982, Number 2 Article 8

Pending Seider Attachments Survive Rush Decision When Defendant Had Not Raised Jurisdictional Defect with Sufficient Particularity to Apprise Plaintiff of Quasi-In-Rem Nature of Objection

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critical problem of bombings in public facilities.[141] Nevertheless, it is submitted that the court has taken a dangerous step toward curtailment of an individual's rights in addressing this concern. Rather than risk sacrificing these rights,[142] it is suggested that the court should encourage a uniform, minimally intrusive search at the courthouse entrance whenever court is in session as an alternative to the type of search sustained in *Alba*.[143]

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Pending Seider *attachments survive* Rush *decision when defendant had not raised jurisdictional defect with sufficient particularity to apprise plaintiff of quasi-in-rem nature of objection*

After the *Seider* doctrine[144] was declared unconstitutional in

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[141] *See* 81 App. Div. 2d at 352-53, 440 N.Y.S.2d at 234-35.

[142] *See* Henry v. United States, 361 U.S. 98, 102 (1959); Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting); People v. Rivera, 14 N.Y.2d 441, 452, 201 N.E.2d 32, 39, 252 N.Y.S.2d 458, 468 (1964) (Fuld, J., dissenting), *cert. denied*, 379 U.S. 978 (1965). *See generally* Terry v. Ohio, 392 U.S. 1, 11-12 (1968). In *Brinegar*, Justice Jackson recognized the difficulty of protecting fourth amendment rights. 338 U.S. at 181 (Jackson, J., dissenting). He noted that many unlawful searches are never scrutinized by courts because of the absence of incriminating evidence. *Id.* (Jackson, J., dissenting). Therefore, Justice Jackson concluded that courts must often exclude evidence seized from guilty defendants in order to protect the innocent against future unconstitutional invasions. *Id.* (Jackson, J., dissenting).

[143] It has been noted that despite the threat posed by public dangers, modifications in constitutional principles should be approached with caution. *See* Jesmore, *The Courthouse Search*, 21 U.C.L.A. L. REV. 797, 799 (1974). The increased threat of violence in courthouses and other federal buildings has resulted in the implementation of limited searches at the entrances to many federal facilities. *See id.* at 799, 809. The constitutionality of regulations requiring searches of all packages carried by individuals into such buildings has been upheld. *See, e.g.*, Downing v. Kunzig, 454 F.2d 1230, 1232-33 (6th Cir. 1972). The immediate danger to property and persons is said to justify these minimally intrusive searches. *Id.*; *see* McMorris v. Alioto, 567 F.2d 897, 900 (9th Cir. 1978). It is suggested that if such a procedure had been employed at the Bronx courthouse whenever court was in session, the issues involved in *Alba* never would have arisen. Indeed, it seems that the danger would have been averted, and the defendant's constitutional rights would not have been affected.

[144] Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The *Seider* doctrine provided that when a defendant had procured liability insurance with a New York insurer doing business within the state, the insurer's obligation to indemnify would be viewed as an attachable debt upon which jurisdiction could be predicated. *Id.* at 114-15, 216 N.E.2d at 314-15, 269 N.Y.S.2d at 101-02. *See generally* Carpenter, *New York's Expanding Empire in Tort Jurisdiction? Quo vadis?*, 22 HASTINGS L.J. 1173, 1180-83 (1971); Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U. L. REV. 1075, 1105, 1116-17, 1135-36 (1968). CPLR 5201(a) defines an attachable debt as one "which is past due or which is yet to become due, certainly or upon demand of the judgment debtor." CPLR 5201(a)

Rush v. Savchuk,[145] New York courts were confronted with the difficult question of how to apply the ruling to pending cases.[146] Although the decision was premised upon constitutional grounds which mandated retroactive application, the application of the decision to pending cases appeared to work an injustice towards plaintiffs who, having instituted their actions in New York in reliance upon New York's tolerance of the doctrine,[147] were time-barred in other jurisdictions. These litigants faced the prospect of dismissal when jurisdictional objections had been raised. Recently, however, in *Gager v. White*,[148] the Court of Appeals preserved

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(1978). *See generally* 7A WK&M ¶ 6202.01.

[145] 444 U.S. 320 (1980). In *Rush*, the Court examined the *Seider* doctrine and found that it failed to satisfy the test of minimum contacts, *id.* at 332-33, first enunciated in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). This test mandates the existence of a relationship between the forum state, the controversy, and the defendant before the state properly may exercise jurisdiction. The scope of the test subsequently was expanded to include the evaluation of quasi-in-rem actions. Shaffer v. Heitner, 433 U.S. 186, 212 (1977). In light of the minimum contacts requirement, the Supreme Court, in deciding *Rush*, found that the *Seider* defendant had no "judicially cognizable ties" with the forum state. 444 U.S. at 332. The Court also noted that "the Due Process Clause 'does not contemplate that a state may make binding a judgment . . . against [a] defendant with which the state has no contacts.'" 440 U.S. at 332-33 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

[146] The Court of Appeals applied *Rush* retroactively in Erneta v. Princeton Hosp., 49 N.Y.2d 829, 830, 404 N.E.2d 1335, 1335, 427 N.Y.S.2d 794, 794 (1980). After the *Erneta* decision, however, there existed some uncertainty as to whether the retroactive application of the *Rush* principle should be limited to instances wherein the plaintiff's cause of action was not time-barred in all proper jurisdictions. Kalman v. Neuman, 80 App. Div. 2d 116, 122-23, 438 N.Y.S.2d 109, 113-14 (2d Dep't 1981); *see also* Siegel, *Seider-Overruling Update*, 257 N.Y. ST. L. DIG. (May 1981) [hereinafter cited as *Update*]. Nonetheless, in most instances, it appears that *Rush* has been applied retroactively. *See, e.g.*, Hill v. Elliott, 79 App. Div. 2d 559, 559, 437 N.Y.S.2d 916, 916 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 475, 425 N.E.2d 851, 442 N.Y.S.2d 463 (1981); Gager v. White, 78 App. Div. 2d 617, 617, 432 N.Y.S.2d 388, 388 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 475, 425 N.E.2d 851, 442 N.Y.S.2d 463 (1981).

[147] Although controversial from its inception, the constitutionality of the *Seider* doctrine was reaffirmed repeatedly by the New York Court of Appeals, *see, e.g.*, Simpson v. Loehmann, 21 N.Y.2d 305, 311, 234 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967). Prior to Shaffer v. Heitner, 433 U.S. 186, 212 (1977), the *Seider* doctrine had also drawn support from the United States Supreme Court. *See* Hanover Ins. Co. v. Victor, 393 U.S. 7 (1968) (appeal of *Seider* action dismissed for "want of a substantial federal question"). After *Shaffer* extended the minimum contacts test to include quasi-in-rem actions, *see* note 145 *supra*, speculation arose that such contacts were lacking in the *Seider* process. *See, e.g.*, SIEGEL § 105, at 127 ("It may well be that the . . . *Shaffer* decision . . . precludes further use of the *Seider* doctrine."); Zammit, *Reflections on* Shaffer v. Heitner, 5 HASTINGS CONST. L.Q. 15, 21 (1978); McLaughlin, Seider v. Roth—*Dead or Alive?*, N.Y.L.J., Dec. 9, 1977, at 1, col. 1, at 24, col. 3.

[148] 53 N.Y.2d 475, 425 N.E.2d 851, 442 N.Y.S.2d 463 (1981).

some *Seider* claims by holding that unless a defendant's objections had been stated with sufficient particularity to apprise the plaintiff of the quasi-in-rem nature of the objection, the defendant would be deemed to have waived his objection under CPLR 3211.[149]

In *Gager,* the court consolidated five *Seider* cases commenced before the *Rush* decision. Of the five defendants, two had presented timely objections to quasi-in-rem jurisdiction, two had made timely objections to "personal jurisdiction," and the fifth had not raised a timely jurisdictional objection.[150] Without distinguishing between objections to in rem and in personam jurisdiction,[151] the Appellate Division, First Department, dismissed each of the four cases in which a timely objection to jurisdiction had been lodged,[152] reasoning that since *Rush* had abolished the concept that the defendant was fictionally present within the state, there was no "defendant against whom further proceedings [could] be continued."[153] The court retained jurisdiction of the case in

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[149] 53 N.Y.2d at 489, 425 N.E.2d at 857, 442 N.Y.S.2d at 469. Specificity of pleading in New York is generally governed by CPLR 3013 which requires that pleadings "be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR 3013 (1974). This section represents a liberalization of prior law, *see* 3 WK&M ¶ 3013.01, and was intended to save time and expense. *See* Foly v. D'Agostino, 21 App. Div. 2d 60, 63, 248 N.Y.S.2d 121, 125 (1st Dep't 1964). Due to the threshold nature of jurisdictional issues, however, as well as the time and expense involved in proceeding with litigation without immediately raising a jurisdictional issue dispositive of the case, strict requirements as to timeliness and specificity were written into the CPLR for jurisdictional motions. *See* Competello v. Giordano, 51 N.Y.2d 904, 905, 415 N.E.2d 965, 965, 434 N.Y.S.2d 976, 977 (1980). *See generally* Homburger & Laufer, *Appearance and Jurisdictional Motions in New York,* 14 BUFFALO L. REV. 374, 378-87 (1964).

[150] 53 N.Y.2d at 488-89, 425 N.E.2d at 857, 442 N.Y.S.2d at 469.

[151] CPLR 3211 provides distinct motions to dismiss for lack of personal jurisdiction (3211(a)(8)) and in rem jurisdiction (3211(a)(9)). Although research reveals no other cases holding that a 3211(a)(8) motion is sufficient to raise a quasi-in-rem jurisdictional objection, the dangers inherent in moving under only one section are well documented. *See, e.g.,* SIEGEL § 267, at 326; 4 WK&M ¶ 3211.15, at 32-67; Homburger & Laufer, *supra* note 149, at 386-87.

[152] Hill v. Elliot, 79 App. Div. 2d 559, 559, 437 N.Y.S.2d 916, 916 (1st Dep't 1980), *aff'd sub nom.* Gager v. White, 53 N.Y.2d 475, 425 N.E.2d 851, 442 N.Y.S.2d 463 (1981); Carbone v. Ericson, 79 App. Div. 2d 551, 551, 433 N.Y.S.2d 806, 807 (1st Dep't 1980), *rev'd sub nom.* Gager v. White, 53 N.Y.2d 475, 425 N.E.2d 851, 442 N.Y.S.2d 463 (1981); Mei Yuet Chin v. Cray, 78 App. Div. 2d 821, 821, 434 N.Y.S.2d 650, 650 (1st Dep't 1980), *rev'd sub nom.* 53 N.Y.2d 475, 425 N.E.2d 851, 442 N.Y.S.2d 463 (1981); Gager v. White, 78 App. Div. 2d 617, 617, 432 N.Y.S.2d 388, 388 (1st Dep't 1980), *aff'd,* 53 N.Y.2d 475, 425 N.E.2d 851, 442 N.Y.S.2d 463 (1981).

[153] Gager v. White, 78 App. Div. 2d 617, 617, 432 N.Y.S.2d 388, 388 (1st Dep't 1980), *aff'd,* 53 N.Y.2d 475, 425 N.E.2d 851, 442 N.Y.S.2d 463 (1981).

which no jurisdictional objections had been raised.[154]

On appeal, the Court of Appeals applied *Rush* retroactively, reasoning that a mere prospective application of the decision would amount to a continuing violation of the *Seider* defendant's due process rights.[155] Writing for the majority,[156] Judge Fuchsberg affirmed the dismissals in those cases where specific and timely objections to quasi-in-rem jurisdiction had been raised.[157] After disposing of the retroactivity question,[158] the Court addressed the issue whether a defendant's objection to "personal jurisdiction" should be considered sufficient to preserve an objection based upon the failure of minimum contacts in a quasi-in-rem action.[159] Relying on the categorical distinctions set forth in the jurisdictional pleading requirements of CPLR 3211(a)(8) and (9),[160] the *Gager*

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[154] Cachat v. Guertin Co., 79 App. Div. 2d 549, 549, 437 N.Y.S.2d 915, 915 (1st Dep't 1980), *aff'd sub nom.* Gager v. White, 53 N Y.2d 475, 425 N.E.2d 851, 442 N.Y.S.2d 463 (1981).

[155] 53 N.Y.2d at 487, 425 N.E.2d at 856, 442 N.Y.S.2d at 468.

[156] Joining Judge Fuchsberg in the majority opinion were Chief Judge Cooke and Judges Jasen and Meyer. Judges Gabrielli, Jones, and Wachtler concurred in a separate opinion.

[157] 53 N.Y.2d at 488, 425 N.E.2d at 857, 442 N.Y.S.2d at 469.

[158] *Id.* at 487, 425 N.E.2d at 856, 442 N.Y.S.2d at 468. In their concurring opinion, Judges Gabrielli, Jones and Wachtler criticized the majority's approach for "overbreadth." *Id.* at 490, 425 N.E.2d at 857, 442 N.Y.S.2d at 469 (Gabrielli, Jones and Wachtler, JJ., concurring). Noting that the propriety of applying *Rush* retroactively had been established in Erneta v. Princeton Hosp., 49 N.Y.2d 829, 830, 404 N.E.2d 1335, 1335, 427 N.Y.S.2d 794, 794 (1980), *see* note 146 *supra*, the concurring judges believed that the only issue presented in *Gager* was whether a mere objection to "in personam" jurisdiction constituted a waiver of the "quasi-in-rem" issue. 53 N.Y.2d at 490, 425 N.E.2d at 858, 442 N.Y.S.2d at 470 (Gabrielli, Jones and Wachtler, JJ., concurring).

[159] 53 N.Y.2d at 489, 425 N.E.2d at 857, 442 N.Y.S.2d at 469. When a timely objection is made under CPLR 3211(a)(8) or (9), the objection to jurisdiction will be preserved throughout the appeals process. *See generally* 4 WK&M ¶ 3211.04-.05. In *Gager*, the Court acknowledged that the objections would be preserved when the defendant had pleaded his objection with sufficient particularity. 53 N.Y.2d at 489, 425 N.E.2d at 857, 442 N.Y.S.2d at 469.

[160] CPLR 3211 states in part:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> . . . .
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> 8. the court has not jurisdiction of the person of the defendant; or
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> 9. the court has not jurisdiction in an action where service was made under section 314 [attachment] or 315.
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> . . . .
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> (e) An objection based upon a ground specified in paragraphs eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he does not raise such objection in the responsive pleading.

Court held that an objection to "personal jurisdiction" was not sufficiently particular to apprise the plaintiff of the quasi-in-rem nature of the objection. The defendants, therefore, were deemed to have waived their jurisdictional objections[161] and voluntarily submitted to the jurisdiction of the New York court.[162]

It is submitted that the Court of Appeals, while recognizing the inequities facing potentially time-barred plaintiffs,[163] properly held that a retroactive application of *Rush* was mandated.[164] The *Gager* Court's opinion indicates that when objections to jurisdiction are properly based upon fundamental constitutional considerations,[165] the Court will be powerless to adjudicate any pending

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CPLR 3211(a)(8)(a) (1970).

[161] The majority reasoned that "[s]ince . . . a defect in the categorically distinct concept of quasi in rem jurisdiction requires a sufficiently particularized pleading to apprise the plaintiff of its nature with sufficient clarity to avoid prejudice by inducing quiescence . . . it follows that the in rem issue must be deemed waived." 53 N.Y.2d at 489, 425 N.E.2d at 857, 442 N.Y.S.2d at 469 (citations omitted). The concurring judges agreed that the "defendant must be explicit, by a 'sufficiently particularized pleading' " and that it would not suffice to "raise challenges to personal jurisdiction over the defendant." *Id.* at 490-91, 425 N.E.2d at 858, 442 N.Y.S.2d at 470 (Gabrielli, Jones and Wachtler, JJ., concurring).

[162] *Id.* at 488-89, 425 N.E.2d at 856-57, 442 N.Y.S.2d at 468-69. The Court noted that the defendant's voluntary appearance in an action in and of itself provides a predicate for jurisdiction in the New York court. *Id.* at 488, 425 N.E.2d at 856, 442 N.Y.S.2d at 468.

[163] The *Gager* Court recognized that the now forumless plaintiffs had chosen "to rely on the authoritative pronouncements of the New York courts," which had upheld *Seider* jurisdiction. *Id.* at 484, 425 N.E.2d at 854, 442 N.Y.S.2d at 466. Most significantly, the *Seider* process had been measured against the *Shaffer* standard by both the New York Court of Appeals, *see* Baden v. Staples, 45 N.Y.2d 889, 891, 383 N.E.2d 110, 111, 410 N.Y.S.2d 808, 809 (1978), and the Second Circuit, *see* O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194, 200-02 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978), and found constitutionally sound. Thus, it is suggested that the plaintiffs were justified in relying upon *Seider* in bringing their actions in New York. *See Update, supra* note 146.

[164] The Court applied *Rush* retroactively despite the plaintiffs' contention that a retroactive application would be improper. 53 N.Y.2d at 484, 425 N.E.2d at 854, 442 N.Y.S.2d at 466. The plaintiffs argued that the "Sunburst Doctrine" was applicable to their case. *Id.*; *see* Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932). This doctrine permits a court to apply the existing state law to the case at bar while overruling the law prospectively. *Id.* at 364. The doctrine, however, does not permit the continued application of law which is repugnant to the Constitution. *Id.* at 363. Thus, the "Sunburst Doctrine" could not be employed in *Gager*, wherein a refusal to apply *Rush* retroactively would have been tantamount to an unconstitutional assertion of jurisdiction over the defendants. *See generally* Rogers, *Perspectives on Prospective Overruling*, 36 U.M.K.C. L. REV. 35, 43-44 (1968).

[165] The *Rush* decision viewed the exercise of *Seider* jurisdiction as a violation of due process. 444 U.S. at 332-33. The *Gager* Court in turn recognized that "a constitutional due process limitation on the power of a State's exercise of its jurisdiction under our Federal system of government . . . is an absolute abnegation of the offending State's ability to continue to act beyond the boundaries the determination defines." 53 N.Y.2d at 484, 455 N.E.2d at 854, 442 N.Y.S.2d at 466; *see* note 164 *supra*. *Compare* Rush v. Savchuk, 444 U.S.

claims. Nevertheless, the Court circumvented the constitutional issue and acknowledged jurisdiction over two defendants by holding that the defendants had waived their jurisdictional defenses by their failure to specifically raise the quasi-in-rem issue as required by CPLR 3211.[166]

The *Gager* decision illustrates a strict application of CPLR 3211. Viewed in light of the statutory requirements, the decision complies with the letter of existing law.[167] It is submitted, however, that the obsolete distinctions inherent in CPLR 3211 prevented the Court from adopting a more progressive view of the actual requirements for jurisdiction.[168] Under the guidelines of this section, the defendant is compelled to acknowledge distinctions between in personam and quasi-in-rem jurisdiction which no longer appear to have a substantive basis.[169] Indeed, the gap between the two types

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320, 332-33 (1980) (fundamental due process violation) *with* Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932) (denial of retroactive application constitutional where law applied at trial was inoffensive to the Constitution).

[166] 53 N.Y.2d at 489, 425 N.E.2d at 857, 442 N.Y.S.2d at 469. Since the *Rush* decision did not determine that *Seider* was unconstitutional until after the 3211 motions had been made, it can be argued that the defendants relinguished an unknown right. Such an interpretation is contrary to the very definition of waiver. McLaughlin, *Seider v. Roth—Farewell to Alms*, N.Y.L.J., Feb. 8, 1980, at 2, col.2.

[167] *See* note 160 and accompanying text *supra*.

[168] From the time of Pennoyer v. Neff, 95 U.S. 714 (1877), to the time of Shaffer v. Heitner, 433 U.S. 186 (1977), the presence of property within a state was enough to submit the interests of a person in that property to the jurisdiction of the state. *See generally* Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U.L. REV. 33, 44-53 (1978). *Shaffer* recognized that an assertion of jurisdiction over the interests of a person in property was essentially an assertion of jurisdiction over that person and, therefore, the same "minimum contacts" test should govern regardless of whether property of the defendant has been attached. *See* note 145 *supra*. CPLR 3211, formulated before *Shaffer* was decided, continues to treat the jurisdictional requirements of the actions as though they were distinct.

[169] Notably, although there is no longer a distinction between the threshold constitutional requirements for the exercise of either in personam or quasi-in-rem jurisdiction, real differences still exist in both the scope of permissible recovery and the rules of procedure applicable to each type of action. For example, in a quasi-in-rem action in a state such as New York which provides for a limited appearance, *see* CPLR 320(c)(1) (1972), the scope of the defendant's recovery will be limited to the property attached. *See generally* SIEGEL § 113, at 140-41. No such limitation adheres in an in personam action. *Id.* A further distinction stems from the fact that although both in rem and in personam jurisdiction must adhere to identical guidelines, the individual state is not required to exercise all the jurisdiction constitutionally available and can set standards more stringent than those required by the Constitution. *Compare* CPLR 302 (1972) (specific situations in which New York may exercise long-arm jurisdiction) *with* CAL. CIV. PROC. CODE § 410.10 (West 1973) ("[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"). Therefore, it is possible for a factual situation to arise in which long-arm jurisdiction, while constitutionally permissible, would not be available under the forum state's long-arm statute. In that instance, if the prospective defendant had prop-

of jurisdiction has been bridged by recent Supreme Court pronouncements which have applied the "minimum contacts" requirement to both in personam and in rem actions.[170] Moreover, the Supreme Court has recognized that it is a fiction to allege that "jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property."[171] It seems, therefore, that a defendant's objection to personal jurisdiction should preserve his minimum contacts objection.[172]

In light of the *Gager* decision, the practitioner should be wary when dealing with CPLR 3211(a)(8) and (9). If any doubts exist as to whether an action falls within the in personam or in rem provision both objections should be raised. Furthermore, it appears that the Supreme Court's proclamation that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe,"[173] has rendered meaningless the distinction between CPLR 3211(a)(8) and (9). Therefore, it is hoped that the legislature will formulate a statute whereby the defendant may make a single jurisdictional objection based upon a failure of

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erty within the forum state, quasi-in-rem jurisdiction would not be precluded. *See* Leathers, *The First Two Years After* Shaffer v. Heitner, 40 LA. L. REV. 907, 909 (1980); Murchison, *Jurisdiction Over Persons, Things and Status*, 41 LA. L. REV. 1053, 1159 (1981). It would seem useful, therefore, for CPLR 3211 to provide an objection to improper attachment unrelated to the proposed "minimum contacts" objection.

[170] *See, e.g.*, Rush v. Savchuk, 444 U.S. 320, 328 (1980). It should be noted that although the Supreme Court has stated that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny," Shaffer v. Heitner, 433 U.S. 186, 212 (1977), speculation has arisen that quasi-in-rem actions require a lesser degree of contacts to satisfy *International Shoe* than do in personam actions. *See, e.g.*, Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017, 1022-23 (2d Cir. 1978). *See generally* Silberman, *supra* note 168, at 71-72. The proper view seems to be that although property within a state can constitute a contact, the presence of property does not, in and of itself, dilute the requirements of *International Shoe*. *See* Shaffer v. Heitner, 433 U.S. at 209.

[171] 433 U.S. at 212.

[172] *Shaffer*, upon which stands *Rush*, held that because jurisdiction over a person's interest is truly jurisdiction over the person, quasi-in-rem actions are to be evaluated according to the standards used to evaluate personal jurisdiction. 433 U.S. at 212. Thus, it appears that with respect to the Constitution, state court assertions of jurisdiction are all in personam. *See* note 168 *supra*. Moreover, it is submitted that regardless of whatever other differences between the two actions may inhere, *see* note 169 *supra*, an objection based upon *Rush* is fundamentally an objection that the forum state does not have jurisdiction over the defendant's person. This view, however, does not appear entirely consistent with the *Gager* holding that an objection to personal jurisdiction is not sufficiently particular to apprise the plaintiff of an objection based upon *Rush*. 53 N.Y.2d at 489, 455 N.E.2d at 857, 442 N.Y.S.2d at 469.

[173] 433 U.S. at 212.

minimum contacts regardless of whether any property of the defendant has been attached. Of course, separate objections would still be appropriate when failure of service or improper attachment is alleged.[174] Nonetheless, it is submitted that the proposed change would lend consistency to jurisdictional pleading under the CPLR.

Richard H. Metsch

Relationship between premium finance agency and insurance company is not sufficient to sustain a cause of action for negligent misrepresentation

The negligent misrepresentation cause of action permits recovery for injuries arising out of justifiable reliance upon careless, though innocent, statements.[175] Although the cause of action read-

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[174] An objection to an attachment procedure, on grounds other than a failure of minimum contacts among the forum, defendant and controversy, would seem warranted because actual distinctions between quasi-in-rem and in personam actions still exist. *See* note 169 *supra.*

[175] New York first recognized a cause of action for negligent misrepresentation in Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922). In *Glanzer,* the plaintiff entered into an agreement to buy beans "in accordance with weight sheets certified by [the defendant] public weighers," employed by the seller. *Id.* at 238, 135 N.E. at 275. The plaintiffs paid for the goods in reliance upon the certified weight measures, which proved to be inaccurate, and sought to recover the overpayment from the public weighers. *Id.* Judge Cardozo, writing for the majority, overcame the restrictions of privity and reasoned that when one acts pursuant to an independent calling to control the conduct of another, the duty to act with care will extend to "all whose conduct was to be governed," even if acting gratuitously. *Id.* at 239, 135 N.E. at 276.

Although the Court upheld the recovery "not merely for careless words . . . but for the careless performance of a service," *id.* at 241, 135 N.E. at 276 (citations omitted), the only evidence of negligence was the inaccurate certificate itself, *id.*; *see* Green, *The Communicative Torts,* 54 TEX. L. REV. 1, 35 (1975), and, therefore, *Glanzer* is still considered the leading case on negligent misrepresentation. Note, *Negligent Misrepresentation: Can an Attorney Rely on What the Government Tells Him?,* 40 LA. L. REV. 859, 860-63 (1980); *see, e.g.,* White v. Guarente, 43 N.Y.2d 356, 362, 372 N.E.2d 315, 319, 401 N.Y.S.2d 474, 478 (1977); Doyle v. Chatham & Phenix Nat'l Bank, 253 N.Y. 369, 377-78, 171 N.E. 574, 577-78 (1930); Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp., 245 N.Y. 377, 381, 157 N.E. 272, 273-74 (1927). In addition, *Glanzer* provided the basis for section 552 of the Second Restatement of Torts on negligent misrepresentation. Green, *supra,* at 35. Under the Restatement, a person is liable for negligent misrepresentation if, "in the course of his business . . . [he] supplies false information for the guidance of others in their business transactions . . . [and] he fails to exercise reasonable care." RESTATEMENT (SECOND) OF TORTS § 552(1) (1976). The Restatement differs from *Glanzer* only in that the former will not impose a duty when the person is acting gratuitously. RESTATEMENT (SECOND) OF TORTS § 552(1) comment c (1976); *But see* Glanzer v. Shepard, 233 N.Y. at 239, 135 N.E. at 276 (1922) ("[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become